IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. .....

WILLMARK SERVICE SYSTEM, INC.,

Petitioner,

W. WILLARD WIRTZ, SECRETARY OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CLARENCE FRIED, Esq.
Attorney for Petitioner.
67 Wall Street,
New York 5, New York.

HAWKINS, DELAFIELD & WOOD,
CLARENCE FRIED,
JOSEPH A. MCCUE,
Of Counsel.

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Willmark Service System, Inc., prays that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit for review of the judgment of that Court, filed May 16, 1963, in the above entitled action.

Opinions Below

The opinion of the United States District Court for the District of Minnesota is reported at 215 F. Supp. 577, and is found at pages 10-26 of the Record in the Court of Appeals. The opinion of the Court of Appeals for the Eighth Circuit affirming the District Court appears in Appendix A, and is reported at 317 F. 2d 486.

Jurisdiction

The statutory provision conferring jurisdiction on this Court is found at 28 U.S.C. 1254(1).

The judgment of the Court of Appeals sought to be reviewed was entered on May 16, 1963 (Appendix B).

Question Presented

1. Whether petitioner's shoppers and supervisors are "engaged in commerce", or "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act, as amended.

2. Whether the Willmark shopping service business is a retail or service establishment and as such exempted from the requirements of said Act by the provisions of Section 13(a)(2) thereof.

Statutes Involved

The pertinent provisions of the Fair Labor Standards Act of 1938, C. 676, 52 Stat. 1060, as amended by the Act of October 26, 1949, c. 736, 62 Stat. 910; 29 U.S.C. 201 *et seq.*, are set forth in Appendix C.

Statement of the Case

This action was brought by plaintiff, W. Willard Wirtz, Secretary of Labor, against Willmark Service System, Inc., alleging violations of the minimum wage, overtime and record keeping provisions[1] of the Fair Labor Standards Act of 1938, as amended.

[1] Sections 15(a)(1), 15(a)(2), 15(a)(5), 6, 7, 11(c), 29 U.S.C., Sections 215(a)(1), 15(a)(2), 15(a)(5), 206, 207, 211(c); (R. 1-4, 8-9).

In substance, the aforementioned provisions of the Act provide that if an employee is "engaged in commerce" or "in the production of goods for commerce" (29 U.S.C. 206, 207), his employer must comply with the enumerated minimum wage, overtime and record keeping provisions of the Act.

The Secretary of Labor alleged that Willmark had employees in its office in Minneapolis, Minnesota, known as shoppers and supervisors and that they were "engaged in commerce" and "in the production of goods for commerce" within the meaning of the Act and that as to these employees Willmark had not observed the minimum wage, overtime and record keeping provisions of the Act (R. 4-4, 8-9). Willmark, by its answer (R. 5-8), asserted that its employees were not "engaged in commerce" or "in the production of goods for commerce" and further alleged that it was exempted from the Act by being a retail or service establishment under Section 13(a)(2).

Willmark Service System, Inc. operates throughout the United States and parts of Canada. The essence of Willmark's business is the rendering of a unique shopping service which was tersely described by its Vice President as follows (R. 140):

> "Our shopping services tests the sales and service personnel of our customers for their proficiency, honesty and general ability. We do this by means of shoppers and supervisors who work in the local stores making test purchases and observing the efficiency and honesty of the sales person."

While Willmark has 29 branches in 23 states, it renders its service at the local level in various retail establishments. At the Minnesota branch office, the petitioner employs two supervisors and three shoppers.

Although several witnesses testified they were primarily interested in purchasing the service and that the reports

which they received from Willmark had no value in of themselves and were incidental to the service (R. 116, 126, 136, 142, 200), nevertheless, the major consideration which influenced the lower courts in the holding that the defendant was engaged in the production of goods for commerce are these very reports (R. 16, 17).

The shopping service performed by Willmark affects the staff of Willmark's customers and the employees of these retail establishments are not "goods" however considered. Certainly, such employees are neither shipped in nor do they constitute an instrumentality of interstate commerce. Their remoteness to interstate commerce is further compounded by the fact that the employees of the retail establishments who are "shopped" are themselves engaged in intrastate activities, *i.e.*, making sales in local retail stores.

In any event, the report is not the service performed but merely evidence of the work done by the shoppers. (R. 116, 142). Yet, the importance attached to the reports is seen by the observation of the Court of Appeals that "A substantial percentage of all reports prepared by the Minneapolis shoppers and supervisors are, when prepared, destined for interstate transmission." (Appendix A. 317 F. 2d 486, 489)

It is petitioner's contention that the district and appeals courts erred in their conclusions of law that the shoppers and supervisors were engaged in the production of goods, engaged in commerce and that they were not a retail or service establishment exempt by the provisions of Section 13(a)(2) of the Act.

It is petitioner's contention that the lower courts, in concluding as a matter of law that the reports prepared by the shoppers and supervisors were goods within the meaning of the Act and that the shoppers and supervisors were engaged in the production of goods for commerce, are in error.

It is petitioner's further contention that the said courts erred on the exemption issue in concluding that Willmark was not recognized as a retail or service establishment under Section 13(a)(2) because said courts ignored the fact that the services rendered by Willmark terminated when performed for its customers who were the ultimate consumers.

The Court of Appeals affirmed the United States District Court on all the issues presented (Appendix A).* An expanded coverage of the facts appears in the Findings of Fact (R. 29-37).

Reasons for Granting the Writ

1. The Court of Appeals for the Eighth Circuit has decided a Federal question in a way in conflict with applicable decisions of this Court. It is the contention of the petitioner that the teachings of this Court in *Mitchell* v. *C. W. Vollmer & Co., Inc.*, 349 U. S. 427, and *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U. S. 207, were misconstrued by the Court of Appeals when it stated:

> "It is our opinion that, under teachings of the Supreme Court and of this Court, there was an adequate basis for the determination of the trial court that the shoppers and supervisors of the Minneapolis branch of Willmark were within the coverage of the Fair Labor Standards Act, as being engaged in commerce and in the production of goods for commerce."

In the first *Mitchell* case, the employees were engaged in the construction of the Algiers Lock and Canal at Paris,

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*Mitchell v. C. W. Vollmer & Co., Inc., 349 U. S. 427; Mitchell v. Lublin, McGaughy & Associates, 358 U. S. 207; Mitchell v. Kroger Company, 8 Cir., 248 F. 2d 935; Durham v. Jones Agency, Inc., D.C.N.D. Ill., 210 F. Supp. 918, affirmed Mitchell v. Jones Agency, Inc., 348 U. S. 864.

Louisana, which was part of the Gulf Intracoastal Waterway and which this Court held was an interstate commerce activity. Since the employees did affect the construction and repair of said facility, they were held to be engaged in commerce. The basic question, however, was stated to be:

> "The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity." (349 U. S. 429)

We submit that the latter test cannot be applied to the facts in the present case because the employees of Willmark's customers are neither an instrumentality nor a facility of interstate commerce. By the same token, the services rendered by Willmark can no more be said to directly or vitally relate to any interstate commerce activity of said retail establishments than would be the services of a psychiatrist retained to appraise the personality traits of such employees.

In the second *Mitchell* case, the employees were non-professional employees of an architectural firm who prepared plans and specifications for roads, turnpikes, bus terminals, radio and television installations. This Court had noted that "Where employees' activities have related to interstate instrumentalities or facilities, such as bridges, canals and roads, we have used a practical test to determine whether they are 'engaged in commerce'." It then went on to re-declare the test applied in the first *Mitchell* case.

In both of the *Mitchell* cases, we thus have an end product which is an instrumentality of interstate commerce. In the present case, there is no such end product. The only time a product comes into the perspective of this case is when a Willmark shopper poses as a customer and ostensibly purchases merchandise as part of the service. This is not

Willmark merchandise, nor is it sold or shipped in interstate commerce as a business transaction. This is the merchandise of the customer which is returned to him (R. 97). But in the final analysis, the services performed relate entirely to the employees of the retail establishments who are the ultimate consumers of Willmark.

When the Trial Court held that Willmark's reports are sold to customers, and that such reports are the very essence of Willmark's business (R. 17) (whereas the essence of petitioner's business is the salutary effect its service produces upon the employees of the customer), it became the case of the tail wagging the dog (R. 33, 143).

In this connection, the lower courts overlooked two important guides in determining whether an employee is "engaged in commerce" as laid down by this Court in *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U.S. 207 and in *Mitchell* v. *C. W. Vollmer & Co., Inc.*, 349 U.S. 427. In the first case, this Court said (p. 211):

> "The question at issue is whether 'these non-professional employees are 'engaged in commerce' as that term is used in §§ 6 and 7 of the Act, 29 U.S.C. §§ 206, 207. To determine the answer to this question, we focus on the activities of the employees and not on the business of the employer."

In the second case, this Court said (p. 429):

> "The question whether an employee is engaged 'in commerce' within the meaning of the present Act is determined by practical considerations, not by technical conceptions."

By making the reports the fulcrum upon which the question of engaging in commerce rested, the Trial Court was primarily influenced by a technical conception contrary to the above rule.

No authorities were cited by the Trial Court to support its position that the shoppers and supervisors were engaged in commerce. The Court merely evaluated the "in commerce" requirement in the following manner:

> "In view of the foregoing, it does not seem necessary to discuss at any great length the question as to whether these employees are engaged in commerce within the meaning of the Act. Suffice it to say that, in addition to the production of goods for commerce and in summary, the supervisors received their written instructions daily and each week copies thereof were forwarded to the home office of the manager; supervisors and shoppers frequently received written bulletins, instructions and memoranda from the home office. Shoppers when first hired must pass written tests which are sent to them from New York and returned to them in commerce; some of the merchandise bought by the Shoppers and Supervisors is returned to out-of-state home offices or warehouses of the customers; the branches operate by moneys made available by the home office; supplies and report forms are received by the local branch from the home office for the use of the Shoppers and Supervisors; and finally these shopping employees must be considered to be an intricate part of the defendant's nation-wide interstate business. Their activities cannot be considered as being in a vacuum. They directly and vitally relate to defendant's interstate activities." (R. 18)

The Trial Court has in effect inquired most fastidiously into the activities of the employer, while almost ignoring the actual duties performed by the shoppers and supervisors. We submit that this Court has never held that under the Fair Labor Standards Act the activity of the employer is predominant and that of the employee previsedby the employer's description. This Court recognized the abolition by Congress of the "business use" test which

introduced a distinction between a retail sale to an individual and one to a business. In *Kentucky Finance Co.*, 359 U. S. 290, 1959, this Court quoted the House and Senate Reports which actually mentioned credit companies as not being exempt; but there is no evidence contained in the decision that this Court removed from consideration a situation as in the instant case. A common sense appraisal does not preclude viewing the employer's business, but the foremost consideration must be given the employees.

In the instant case the District Court was only deciding the coverage of employees during work weeks within Minnesota, thus limiting the issue the Court stated:

> "Therefore, in considering the questions submitted here, it would seem that the court should confine its consideration to the employees engaged in shopping services solely within the confines of the State of Minnesota." (R. 14)

The Court was in effect recognizing the established standard of the work week which determines the applicability of the Act. (See: *Hogue v. Wilcox and Ziegler, Inc.*, 178 F. Supp. 180 (D. C. Md. 1959); Department of Labor Interpretation Bulletin Sec. 776.4.) It is clear that the issue of coverage must have been determined on the activities of the shoppers and supervisors performed solely within Minnesota. The shoppers and supervisors perform work of a concededly local nature within one state. They do not cross state lines nor do they use facilities of interstate commerce during the work week in issue (R. 32).

The past legislative history and the legislative history of the 1961 Amendment to the Fair Labor Standards Act demonstrate that the new amendment deviated from the original 1938 test of the activities of the employee and provided additional coverage for *employees* of "enterprises" engaged in commerce. (See Sec. 3(S) of the Act, as amended.)

The lower court views run amiss when the legislative history to the 1961 amendments of the Fair Labor Standards Act are reviewed. (See: Senate Report No. 145, 1961 U. S. Code Congressional and Administrative News 1620, 1644-47). The legislative history of the 1961 Amendment clearly illustrates that even with the new extended coverage Willmark would not be an enterprise which has "purchased or received goods for resale that move or have moved across State lines" (Sec. 3(s)(1)).

It is clearly stated that prior to the amendment "Employees who do have this protection are employed principally in mail-order houses in central offices and warehouses of chain stores." (1961 U. S. Code Congressional and Administrative News 1646.)

While the 1961 Amendment has broadened the field of coverage it has continued to reject the test that interstate commerce is equal to enterprises located in more than one state (1961 U. S. Code Congressional and Administrative News 1664).

The District Court in *Mitchell* v. *Welcome Wagon*, 139 F. Supp. 674, 678 (D. C. Tenn. 1954), aff'd *per curiam* 232 F. 2d 892 (6th Cir. 1956), was not smitten by the specious argument when it observed:

> "In determining coverage, it is immaterial whether the employee is hired by one engaged in an interstate business since it is the activities of the employee and not of the employer which are decisive." (Citations omitted)

The Court of Appeals below cited its own decision in *Mitchell* v. *Kroger*, 248 F. 2d 935, 939 (8th Cir. 1957), but failed to distinguish the two situations involved. In the *Kroger* case, the said Court stated:

> "The auditors are the fingers of the branch office hand, transmitting the result of their activities to the

branch, where they are ultimately forwarded to the home office. The auditors thus become an essential and integral part of Kroger's interstate activity."

The *Kroger* case is clearly distinguishable from Willmark since Kroger was concerned with auditors who worked for the company in various capacities and dealt with many of the retail stores contained within several states. In Willmark, however, the shoppers and supervisors are employed by an independent contractor and are members of "shopping crews who pose as shoppers and serve as Willmark customers in the assigned area of the Minneapolis branch." The purpose of the information obtained by the shoppers, as stated by the Trial Judge, relates only to "the courtesy, efficiency, ability and honesty of the clerk who attends them" (R. 31). The auditors' duties for Kroger were functionally related to the entire scope of the Kroger business, while Willmark shoppers and supervisors were limited to certain retail establishments and in no way could be judged as having duties which would invade the general business of Willmark. The very nature of the auditors' duties in Kroger included the traveling into various stores and the crossing of state lines in order that they might supervise the general bookkeeping and business systems of the Kroger company. This decision is obviously not persuasive on the duties performed by the Willmark shoppers and supervisors during the work weeks in issue.

From a review of the decisions, and the legislative history of the 1961 Amendments, it is apparent that the shoppers and supervisors do not engage in commerce. The 1961 Amendments have not rendered the instant case moot, but rather have further clarified the specific definition of an "enterprise" so that Willmark is not producing goods or engaged "in commerce" under the Fair Labor Standards Act, as amended. This Court thus has an opportunity to pass on these questions of statutory interpretation with

the added guidance of the 1961 legislative history. Although the exact question involved herein has not been decided by this Court and the 1961 Amendments should be reviewed by this Court for further clarification of the issues involved herein, the broad concept as to the rules to be applied in determining coverage under the Act has been overlooked by the lower courts here and by so much are in conflict with decisions of this Court in *Mitchell* v. *Lublin, Mitchell* v. *Vollmer, supra*, and *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 132.

2. The decisions of the Courts of Appeals in the instant case and in *Mitchell* v. *Sorvas*, 182 F. Supp. 800, 294 F. 2d 841 (3rd Cir. 1961), upon which authority the case at Bar was decided, are in conflict with the decisions of the Court of Appeals in *Bozant* v. *Bank of New York*, 156 F. 2d 787 (2d Cir. 1946); *Mitchell* v. *Welcome Wagon*, 139 F. Supp. 679 (W. D. Tenn. 1954), aff'd *per curiam* 232 F. 2d 892 (6th Cir. 1956), and in conflict with the decision of the District Court in *Mitchell* v. *Krout*, 150 F. Supp. 857 (N. D. Calif. 1957).

United States District Judge Nordbye, the Trial Judge, in his memorandum decision (R. 10-26) recognized the evident conflict in the statutory interpretation of the word "goods" under Sec. 3(i) of the Fair Labor Standards Act (Appendix C) when he stated (R. 17):

> "Consideration of the various cases which have been concerned with similar questions brings one into a realm of decision law which seems to be in hopeless confusion. Cases may be found which support defendant's position in its contention that these reports do not constitute goods, such as *Mitchell* v. *Welcome Wagon*, W. D. Tenn., 1954, 139 F. Supp. 679, aff'd 6th Circ., 232 F. 2d 892; *Mitchell* v. *Household Finance Corp.*, 3rd Circ., 1953, 208 F. 2d 667; *Mitchell* v. *Krout*, N. D. Calif., 1957, 150 F. Supp. 857."

The basic purpose of enacting the Fair Labor Standards Act was to eliminate certain conditions "in industries engaged in commerce or in the production of goods for commerce" (29 U.S.C., Section 202). Willmark, as a service organization, is not the type of industry envisioned by the Act but, because of a resort to fictions, the failure to distinguish between the service rendered by its employees, its own inter-corporate activities, the inter-corporate activities of its customers and the conflict and uncertainty of the cases construing the Act, Willmark is now held to be a part of an industry engaged in commerce or in the production of goods for commerce contrary to the purpose and intent of Congress in enacting the Fair Labor Standards Act. Such a result was only possible because of the lack of definitive ruling by this Court and the unerystallized thinking generally of the various United States District Courts and the Courts of Appeals as to the application of the Act to service organizations. In the instant case, the strained interpretation of the Act is apparent from the ruling that the reports of Willmark constitute "goods" and consequently Willmark is an industry "engaged in commerce" or "in the production of goods for commerce." The actual business purpose of Willmark is thus completely ignored and the realities of this situation are obscured by a resort to fiction and semantics.

Willmark furnishes certain shopping services for various retail clients and as a part of this service aids in the protection, utilization and successful management of the retailer's employees (R. 31). The service which Willmark renders merely aids the retailer in the responsible management of his business. The control of the retailer's employees is within the exclusive jurisdiction of the retail establishment and Willmark does not add to the goods in the possession of the retailer, but in effect only evaluates the services of the retail business. Willmark does provide informational reports and data as to the honesty, efficiency

and integrity of the customer's employees and the effectiveness of the various facets of their client's managerial controls, but this in no way adds to what is already present. Willmark is in fact allowed to visit and evaluate what the retailer already possesses, that is, his staff. This is the end product of Willmark services and certainly the staff is not "goods" within the purview of the Act. The management of these retail establishments offers Willmark the opportunity of viewing what they have amassed and the reports which Willmark prepares merely clarify the actual situation in the retailer's business and these reports do not equal a new product, but rather rectify the personnel problems and policies found in such a business.

In *Mitchell* v. *Krout*, 150 F. Supp. 857 (N. D. Calif. 1957), the Court there considered the status of employees who performed services substantially similar to those performed by the Willmark employees. The reports of Krout's employees were disseminated to the various branches and head offices in numerous states. The District Court, after referring to the definition of "goods" contained in Section 203(i) then went on to state:

> "[1] The broadest interpretation could not bring the investigative service or the reports within the contemplation of the foregoing definition. They are specifically compiled and prepared to meet the particular problem of a specific client and are not sold or offered for sale to the public generally. McComb v. Turpin, D. C., 81 F. Supp. 88, 89. To this extent they are unlike stocks, bonds and commercial papers which are themselves instruments of commerce."

After quoting from the decision of *Bozant* v. *Bank of New York*, 156 F. 2d 787 (2d Cir. 1946), the Court held:

> "[2] *The defendants' employees are not engaged in commerce within the contemplation of the Act:* It

> appears affirmatively from the facts that the investigative work was performed wholly within the State with the exception of a comparatively small amount in Oregon and Washington. The fact that a customer of the defendants may pass the information, reports or service on to an office located outside of the State does not transform an intrastate operation into one in 'commerce.' *McLeod* v. *Threlkeld*, 319 U. S. 491, 497, 63 S. Ct. 1248, 87 L. Ed. 1538. Nor does the fact of mailing between the offices, bring the employees within the coverage of the Act. *McComb* v. *Turpin, supra.*"

The Court further held that the Krout organization was recognized as a retail establishment and was, therefore, entitled to an exemption under 29 U.S.C.A. 213(a)(2).

Although the decision in the *Krout* case was rendered by the District Court (no appeal having been taken from the judgment), it is the only published judicial view on this question in the Ninth Circuit.

We thus have the anomalous situation that Willmark which conducts business in the State of California (R. 44) is not required to comply with the Act and is exempt from the *Krout* case, whereas Willmark is held to be in violation of the Act in the State of Minnesota. This problem confronting Willmark is further accentuated by the fact that Willmark is in competition with Krout and the latter has been held not to be within the provisions of the Act under the foregoing case.

In *Mitchell* v. *Welcome Wagon, supra*, the defendant performed services for business organizations which consisted of calls made by hostesses on families in the community to publicize goods or products of the subscribers and to make reports regarding the activities of the host-

esses. As to the reports made by the hostesses, the Court said (139 F. Supp. 679):

> "[9] The communications with Defendant's divisional offices, including the rare transmittal of the executory service contracts, are purely internal, and like the confidential daily reports sent to the subscribers, are incidental to the local services performed by the employee. The records, reports and the service contract have no value of their own. They are not Defendant's objective and Defendant does not sell them as goods. Their preparation and transmission incident to a business whose purpose does not comprise the production of goods at all, do not constitute engaging in the production of 'goods'. *Bozant* v. *Bank of New York*, 2 Cir., 156 F. 2d 787; *Kelly* v. *Ford, Bacon & Davis*, 3 Cir., 162 F. 2d 555; *Scholl* v. *McWilliams Dredging Co.*, 2 Cir., 169 F. 2d 729; *Mitchell* v. *Household Finance Corp.*, 3 Cir., 208 F. 2d 667; *Billeaudeau* v. *Temple Associates, Inc.*, 5 Cir., 213 F. 2d 707."

Certainly, the above decision is in conflict with the decision rendered by the Court of Appeals for the Eighth Circuit. Consequently, we have a conflict between that Circuit and the Sixth Circuit.

The case of *Mitchell* v. *Household Finance Corp.*, 208 F. 2d 667 (3rd Cir. 1953), involved the coverage of employees under the Fair Labor Standards Act in a local office of a nationwide small loan company. The Court held that the preparation and sending of reports did not constitute the production of goods for commerce and in support of this position, the Court cited *Bozant* v. *Bank of New York*, 156 F. 2d 789 (2d Cir. 1946). In the *Bozant* case, Judge Learned Hand recognized the distinction between reports sent across state lines and documents which, by their very essence, are considered property. The *Household Finance* and *Bozant* decisions represent the views of the Second and Third Circuits, which are in con-

flict with the position taken by the Court of Appeals for the Eighth Circuit in the *Willmark* case. The *Mitchell* v. *Household Finance* decision was prior to the ruling in *Mitchell* v. *Sorvas, infra*, and though the later view may eventually prevail, both cases demonstrate the uncertainty in the Third Circuit.

The case of *Mitchell* v. *Sorvas*, 182 F. Supp. 800, 294 F. 2d 841 (3rd Cir. 1961), concerned a shopping service for the investigating, on behalf of subscribers, the honesty and efficiency of sales people. Sorvas employed shoppers and supervisors who worked in crews conducting investigations. The District Court held that the Sorvas enterprise was recognized as a retail sales organization and that as such was exempted under the Fair Labor Standards Act. This District Court decision was overruled by the Court of Appeals for the Third Circuit wherein it was held that the shoppers and supervisors at Sorvas were not employees of an exempt retail or service establishment and were, therefore, brought within the purview of the Fair Labor Standards Act. The question as to whether the reports of these supervisors and shoppers were "goods" within the meaning of the Fair Labor Standards Act was not raised on appeal and, therefore, could not have been decided. The entire discussion by the Court centered about the exemption of the Sorvas organization as a retail establishment entitled to exemption from the Act and Section 13(a)(2). While there are minor distinctions between the *Sorvas* situation and the *Willmark* case, it is petitioner's contention in any event that the *Sorvas* case was improperly decided.

The above illustrates the conflict among the various circuits on substantially the same matter, to wit: whether the statutory definition of "goods" as defined in 29 U.S.C. 203(i) (Appendix C), includes the documentary data in the informational reports prepared by Willmark employees. This definition presents an important Federal question of

statutory interpretation which has heretofore created an incommodious departure from certainty of direction for the lower courts. The interpretation of the word "goods" must preponderate over tractarian formality if it is to perfect a significant standard of federal uniformity. The *ratio legis* of this statute, interpreting the word "goods" as applied to service organizations not identified with a product in commerce, has been left undetermined and should be adjudicated by this Court.

3. Although in a sense the "exemption issue" is collateral to the major question of coverage under the Act, the same threads of conflict among the different circuits and the inconsistency between the decision of the lower courts in this case and the decisions of the Supreme Court are still present.

The Fair Labor Standards Act at Section 13(a)(2) of the Act, included in Appendix C, provides an exemption of retail or service establishments which meet certain requirements. There is no question that Willmark satisfies two requirements of Section 13(a)(2), as found by Judge Nordbye in Findings of Fact 37 and 38 (R. 36). The only question was whether Willmark would qualify under the third requirement, that is, was it recognized in the particular industry as a retail sales or service establishment.

The statute specifically grants exemption to a business which sells goods or performs services "recognized as retail sales or services in the particular industry." Although even witnesses called by plaintiff testified that the services rendered by the defendant were recognized as retail services (R. 95, 103, 111, 119, 127, 136) and witnesses called by Willmark so testified (R. 146, 164, 191, 201, 210) and several witnesses made it clear that the services were performed only in local retail establishments (R. 80, 92, 95), the Trial Court, nevertheless, held that the testimony was of little value and did not preponderate in favor of the defendant to support its claim for exemption

and was evidently induced by the conclusions reached in the *Sorvas* case to ignore the testimony offered (R. 22). The Court of Appeals similarly relied upon the *Sorvas* case in this respect (P. 29, Appendix A) and also cited *Mitchell* v. *Joyce Agency, Inc.* as a guidepost but failed to distinguish between the basic facts.

This Court in a memorandum decision *Mitchell* v. *Joyce Agency, Inc.*, 348 U. S. 945, 1955, decided that the employees of the Joyce Agency performing duties as watchmen, guards, detectives and fire inspectors were engaged in commerce and not employees of an exempt retail or service establishment. The characterization of the Joyce employees did not include shoppers and, therefore, the Court could not have passed on their coverage under the Act. It is worth noting that the Secretary did not by his complaint even raise the question of coverage as to the "shoppers" and while the syllabus of the *Joyce* case and the head notes, both prepared by the publishing company, would lead one to believe that the shoppers in the retail stores were involved in that action, a careful reading of the decision would demonstratively contradict the characterized inclusion of these shoppers. An ambivalent situation regarding the status of these shoppers in the *Joyce* decision should not now become a precedent to be used for their coverage.

The employees in the *Joyce* situation were located in the warehouse terminal of Goldblatt & Co., within which goods were both received from and shipped in interstate commerce—a vital factor in the Court's determination. The guards, in fact, had charge of protection of the goods in all stages and the inspectors actually supervised the Goldblatt employees in certain activities, such as fire drills. We have no "front line" association with interstate commerce by the Willmark shoppers and supervisors. The Court of Appeals in *Mitchell* v. *Sorvas*, *supra*, stated that shoppers were within the class of employees viewed by the *Joyce* decision, which is clearly not the fact.

The significant fact in the *Joyce* case is that the guards were protecting goods in interstate commerce. They were not, as in the case of Willmark, evaluating the worth of employees. The importance of a relationship to some goods or tangible physical property is clearly demonstrated by the fact that this Court in reversing the Court of Appeals for the Seventh Circuit (*Durkin* v. *Joyce*, 211 F. 2d 251) cited three cases; namely, *Kirschbaum* v. *Walling*, 316 U. S. 517; *Walling* v. *Jacksonville Paper Corp.*, 317 U. S. 564 and *Phillips Co.* v. *Walling*, 324 U. S. 490. In *Kirschbaum* v. *Walling*, the employees were engaged in the maintenance and operation of a building whose tenants were principally engaged in the production of goods for interstate commerce and this Court held:

> "In our judgment the work of the employees in these cases have such a close and immediate tie with the process and production for commerce and was therefore so much of an essential party that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce'." (p. 526)

In the *Phillips* case, the employees were directly engaged in physically handling or performing functions relating to the shipment of physical goods and the only question was whether or not employees of the petitioner who were employed at the petitioner's warehouse and central office were engaged in a retail business. This Court held that such employees were not within the exemption of Section 13 (a)(2) of the Fair Labor Standards Act.

In *Walling* v. *Jacksonville Paper Corp.*, the employees of a wholesale paper company were held to be engaged in interstate commerce even though some of the employees' activities related to shipments from a company warehouse to customers within the same state. This Court pointed out that (p. 571):

"The fact that all of respondent's business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work. *Kirschbaum Co.* v. *Walling*, *supra*, p. 524. If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act. Here as in other situations (*Kirschbaum Co.* v. *Walling*, *supra*, p. 523) the question of the Act's coverage depends on the special facts pertaining to the particular business."

The common denominator of the above cases is the existence of "goods" which are affected or "touched" in a direct or indirect sense by the services of the employee. In the instant case, as we have shown above, the services rendered did not relate to any goods (except the occasional feigned purchase of the customers' own goods which were returned) but rather to the proficiency and honesty of the employees and the latter by no stretch of the imagination can be construed to be goods within the contemplation of the Congress.

In *Mitchell* v. *Krout*, *supra*, which has already been discussed, the Court found that the Krout business was recognized as a retail or service organization and was exempt under Section 13(a)(2) of the Fair Labor Standards Act. The factual situations in both *Willmark* and *Krout* are without any substantive distinction. The Court of Appeals below has cited the case of *Mitchell* v. *Kentucky Finance Co., Inc.*, 359 U. S. 290, seemingly for the proposition that Willmark is not exempt by reason of the retail or service organization provision. It is obvious that the *Kentucky Finance* case concerned itself with the enterprises in the financial field and the decision therein does not pass on the status of employees engaged in a business such as Willmark. This Court merely held that small loan companies

did not qualify for an exemption under Section 13(a)(2). In effect, both the Secretary, and the Court of Appeals below, have misread this Court's decision in *Kentucky Finance Co.* This Court clearly stated its rule as follows:

> "* * * Thus enterprises, in the financial field, none of which had previously been considered to qualify for the exemption regardless of the class of persons with which they dealt, and regardless of whether they were thought of in the financial industry as engaged in 'retail financing remained uneffected by the amendment of § 13(a)(2).
>
> Any residual doubt on this score is disspelled by the expert and repeated statement of the sponsor of the amendatory legislation and in the House and Senate Reports to the effect that 'the amendment does not exempt banks, insurance companies, building and loan companies, gas and electric utility companies, telegraph companies, etc.' because there is no concept of retail selling or servicing in these industries. Where it was intended that such businesses have an exemption one was specifically provided by law. * * *"

The petitioner offered testimony from numerous individuals in connection with its status as a recognized retail service establishment. These included Mr. Herrmann (R. 106-112), Mr. Schindler (R. 120-130) of Sears, Roebuck and Company, Mr. Federle (R. 217) of W. T. Grant, Mr. Duncan (R. 119) of Household Finance Company and Mr. Gamble (R. 136) of the Custom Shop. All these witnesses agreed that the Willmark Services were recognized as retail services within that industry. A review of the testimony mentioned above clearly indicates that in the opinion of these retail businessmen Willmark has been, and is considered a retail service establishment. It is evident that the Courts below are apparently denying the claimed exemption since Willmark's customers are business establishments rather than individual consumers. This position

harkens back to the construction of the "business use" test applied by this Court in *Roland Electric Co. v. Walling*, 326 U. S. 657, 1946, which Congress specifically rejected and changed by the 1949 amendment to the Fair Labor Standards Act. The Courts below have in effect determined that the petitioner was not exempt regardless of the evidence supporting that claim, thus casting an unreasonable burden of almost conclusive proof to entitle a party to exemption under Sec. 13(a)(2). (See: *Boisseau v. Mitchell*, 218 F. 2d 734 (5th Cir. 1955)).

4. Clearly, the questions presented are of importance since they affect the entire shopping service industry in its liaison with retail businesses throughout the country. There are about 100 firms engaged in this field (R. 191) and some comply with the Act "because we found it less expensive than to fight the government" (R. 199). Settlement of the issues by this Court is plainly in the public interest since the questions are likely to arise under the provisions of the 1961 Amendment to the Fair Labor Standards Act and this Court may now utilize the 1961 legislative history to clarify the situation.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLARENCE FRIED,
Counsel for Petitioner.

HAWKINS, DELAFIELD & WOOD,
CLARENCE FRIED,
JOSEPH A. MCCUE,
Of Counsel.

APPENDIX A.

Opinion of the Court Below.

May 16, 1963.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,073.

Willmark Service System, Inc., Appellant, vs. W. Willard Wirtz, Secretary of Labor, United States Department of Labor, Appellee.	Appeal from the United States District Court for the District of Minnesota.

[May 16, 1963.]

Before SANBORN and BLACKMAN, Circuit Judges, and STEPHENSON, District Judge.

SANBORN, Circuit Judge.

This is an appeal by Willmark Service System, Inc. (Willmark), of New York, from a judgment in favor of

the Secretary of Labor in an action brought by him against it, under 29 U.S.C. § 217, alleging violations of the minimum wage, overtime and record-keeping provisions[1] of the Fair Labor Standards Act of 1938, as amended,[2] 29 U.S.C. § 201 et seq., and asking for an injunction. The Secretary's claim was that Willmark had employees at its branch office in Minneapolis, Minnesota, known as shoppers and supervisors, who were "engaged in commerce" and "in the production of goods for commerce" within the meaning of the Act, and with respect to whom Willmark had not observed the wage, hour and record-keeping requirements of the Act. Willmark denied that the employees in suit were engaged in commerce or in the production of goods for commerce, and alleged that it was by virtue of § 13(a)(2) of the Act, 29 U.S.C. § 213(a)(2), an exempt retail or service establishment. It was undisputed that Willmark had not conformed to the wage, hour and record-keeping requirements of the Act with respect to these employees during workweeks when their activities were entirely confined to Minnesota, but had substantially complied with such requirements when their work required travel across State lines.

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[1] §§ 15(a)(1), 15(a)(2), 15(a)(5), 6, 7, 11(c); 29 U.S.C. §§ 215(a)(1), 215(a)(2), 215(a)(5), 206, 207, 211(c).

[2] Ch. 676, 52 Stat. 1060; ch. 736, 63 Stat. 910.

[3] 29 U.S.C. § 213(a); 63 Stat. 917, § 13(a):

"SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; * * *."

Appendix A.

The following issues were tried to the District Court: 1. Were the shoppers and supervisors of Willmark at its Minneapolis branch engaged in commerce?[1] 2. Were they engaged in the production of goods for commerce? 3. If otherwise covered by the Act, were they employees of an exempt "retail or service establishment" by virtue of § 13(a)(12) of the Act, 29 U.S.C. § 213(a)(2)? 4. Were certain "free-time" periods of these employees working time under the Act?

The basic facts were undisputed and largely stipulated. Judge Nordbye, the trial judge, filed a memorandum decision (F.Supp.), supplemented by detailed Findings of Fact and Conclusions of Law. Every issue was thoroughly explored and decided in favor of the Secretary. The decision of the trial judge contains an adequate and accurate statement of the facts, of his views of the applicable law, and of his ultimate conclusions. Nothing could be accomplished by merely restating, copying, or paraphrasing what has already been accurately and understandingly said by the trial judge. The Fair Labor Standards Acts has recently been exhaustively analyzed, interpreted, examined and re-examined by this Court. See *Mitchell* v. *Kroger Company*, 8 Cir., 248 F.2d 935; *Goldberg* v. *Wade Lahar Construction Company*, 8 Cir., 290 F.2d 408, certiorari denied 368 U.S. 902. We shall confine ourselves, so far as possible, to a concise statement of our views with respect to the questions for decision.

[1] Willmark contends that "The issues before this court involve only the activities of shoppers and supervisors during weeks in which they remain within Minnesota." The trial judge found it "necessary to consider the over-all picture of defendant's nation-wide and Canadian activities and the relation of the local investigative employees thereto in determining whether or not these employees are under the Act." We agree that the issue of coverage was not to be determined from the employees' Minnesota activities considered in isolation.

Appendix A.

Willmark is an organization which operates throughout the United States and parts of Canada. Its business is, and has been for many years, to furnish to mercantile establishments a "shopping service" for the purpose of keeping them informed as to the honesty and efficiency of their sales people. It also furnishes some other related services. Its central and executive offices are in New York City. It has 29 branches located in 23 States, 78 employees at its New York City office, and a total of 350 at its various branches. The annual gross income of Willmark is more than three million dollars. Its activities are administered and directed from its main office in New York. Its customers are billed from there, and send their payments there.

Willmark is licensed as a detective agency in Minnesota and in other states where the laws require it. In its Minneapolis branch it has a manager, a bookkeeper, a stenographer, a part-time clerk, two supervisors, and three shoppers. The branch is financed from the home office. The local branch manager gives daily instructions to the local supervisors, copies of which are mailed to the New York office. That office regularly communicates by mail, telephone and telegraph with the branch managers.

The shoppers and supervisors at the Minneapolis branch made investigations of the sales people of Willmark's customers at their respective establishments in Minnesota, Iowa, parts of Canada, and until 1959 in Wisconsin. They work in crews of three, consisting of a man supervisor and two women shoppers. For the purpose of obtaining information as to the courtesy, efficiency, ability and honesty of the sales people whom they undertake to investigate, the members of the crew enter the establishment in the guise of ordinary shoppers, and act as such during their stay. Each member makes mental note, while in the establishment, of anything he or she observes and thinks would be of concern or interest to the customer

for whom the investigation is being conducted. After the crew has left the establishment, each member makes a separate written report, usually upon forms sent to Willmark's Minneapolis branch from the New York office. A copy of the report is usually left with a representative of the customer. If the home office of the customer is not in the same location as the establishment investigated, the report is mailed by Willmark's Minneapolis branch office to the customer at its home office, whether in or outside the state of Minnesota.

If a shopper or supervisor, while investigating an establishment, observes that a sales clerk has been guilty of an irregularity, and if that is verified, a violation report is made out, giving the details. This is furnished to the manager of the establishment, and copies are mailed by the Minneapolis branch of Willmark to the home office of the customer, and to the home office of Willmark, where the report becomes a part of the "Employees Information File" in that office. The file contains hundreds of thousands of records listing the names of persons who have, by Willmark shoppers and supervisors, been found to have committed irregularities. The information contained in the file is made available to Willmark's customers.

A substantial percentage of all reports prepared by the Minneapolis shoppers and supervisors are, when prepared, destined for interstate transmission. When these employees, in the course of their work, purchase merchandise from a customer's store, it is delivered to Willmark's Minneapolis branch office, which returns it to the customer at its home office or its central warehouse, whether within or without the state of Minnesota. One of the findings of fact of the trial court was: "The activities of defendant's Minneapolis branch shoppers and supervisors are an integral part of the defendant's nation-wide business. Their activities directly and vitally relate to defendant's interstate activities."

Appendix A.

The defendant argues, in substance, that the District Court erred: 1. In admitting, over objection, evidence as to the activities of Willmark and its customers. 2. In determining (a) that the shoppers and supervisors at the Minneapolis branch were engaged in the production of goods for commerce, (b) that they were engaged in commerce, (c) that the services rendered by them are not within the terms or the spirit of the exemption provided in § 13(a)(2) of the Act, and (d) that the "free-time intervals imposed on the shoppers" when temporarily idle during their workdays constituted "hours worked".

The trial court, in this nonjury case, could not have committed reversible error in receiving, over objection, incompetent evidence. In *Builders Steel Co.* v. *Commissioner of Internal Revenue*, 8 Cir., 179 F.2d 377, 379, it is said:

> "In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made."

See, also, *Collins* v. *Owen*, 8 Cir., 310 F. 2d 884, 885.

It is our opinion that, under teachings of the Supreme Court and of this Court, there was an adequate basis for

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Mitchell v. *C. W. Vollmer & Co., Inc.*, 349 U.S. 427; *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U.S. 207; *Mitchell* v. *Kroger Company*, 8 Cir., 248 F.2d 935; *Durkin* v. *Joyce Agency, Inc.*, D.C. N.D.Ill., 110 F.Supp. 918, affirmed *Mitchell* v. *Joyce Agency, Inc.*, 348 U.S. 945.

the determination of the trial court that the shoppers and supervisors of the Minneapolis branch of Willmark were within the coverage of the Fair Labor Standards Act, as being engaged in commerce and in the production of goods for commerce. This case, as we see it, differs in no controlling respect, as to the question of coverage, from the case of *Mitchell* v. *Sorvas*, D.C. W.D.Pa., 182 F.Supp. 800, which was decided by the Honorable Wallace S. Gourley, Chief Judge of the District Court for the Western District of Pennsylvania. The defendant, Sorvas, had a "shopping service" like that of Willmark for investigating, on behalf of subscribers, the honesty and efficiency of their sales people. Sorvas employed shoppers and supervisors who worked in crews conducting shopping investigations. They operated in substantially the same way as the Willmark crews. The Sorvas operation made similar use of interstate facilities for travel and for transmission of reports and other communications in carrying on business The Secretary of Labor brought an action against Sorvas on the claim that his shoppers and supervisors were covered by the Act, and that it was not being complied with. Judge Gourley determined that Sorvas was engaged in commerce and in the production of goods for commerce,[6] but that his sales of services were recognized as retail sales in the shopping service industry, and that his business, "as a retail and service establishment;" was exempt from the requirements of the Act by virtue of § 13(a)(2).

The Secretary appealed from Judge Gourley's decision, and the Court of Appeals for the Third Circuit, 294 F.2d 841, reversed on the ground that Sorvas did not qualify for exemption as a "retail or service establishment"

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[6] The Judge did not specifically find that the shoppers and supervisors were so engaged, but that is necessarily to be inferred from his opinion, and was so considered by the United States Court of Appeals for the Third Circuit on appeal.

under § 13(a)(2). The correctness of Judge Gourley's ruling with respect to the shoppers and supervisors being engaged in commerce was not questioned on appeal. (Page 844 of 294 F.2d.) The *Sorvas* case is authority for the proposition that employees such as the shoppers and supervisors at Sorvas or Willmark are not employees of an exempt "retail or service establishment" under § 13(a)(2), for the reason that such an establishment was not exempt prior to the 1949 amendment of that section, and Congress, in amending the section, had no intention "to broaden the fields of business enterprise to which the exemption would apply." (See *Mitchell* v. *Kentucky Finance Co., Inc.*, 359 U.S. 290, 294.) The *Sorvas* case supports the determination of the trial court in the instant case that the Willmark employees in suit are covered by the Act.

It is argued on behalf of Willmark that the ruling of the Third Circuit in the *Sorvas* case is based upon a misconception of the decision in *Mitchell* v. *Kentucky Finance Co., Inc., supra*, and is entirely unsupported otherwise. It is also contended that the *Sorvas* decision was based upon an inadequate record, lacking "persuasive evidence clarifying and explaining the nature of the shopping clarifying and explaining the nature of the shopping services and their background and growth," which was "no doubt instrumental in compelling the conclusion reached by the Court of Appeals." It is true that the instant case was tried with meticulous care and is before us on an excellent record. The record in the *Sorvas* case, however, adequately presented the same problem with which we are concerned. That case was, in our opinion, correctly decided, and we find no justification for refusing to follow it.

Moreover, in *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392, we are told that the exemptions of § 13 of the

Act "are to be narrowly construed against the employers seeking to assert them" and "limited to those establishments plainly and unmistakably within their terms and spirit." Willmark, rather obviously, does not qualify as an establishment "plainly and unmistakably" within the terms and spirit of § 13(a)(2).

We find nothing to warrant a rejection of the conclusion reached by the District Court that certain comparatively brief intervals of so-called "free time" forced upon the shoppers during their workdays, which intervals were fortuitous and of no use or benefit to them, were includable in working time.

The judgment appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

Judgment of the Court Below.

May 16, 1963.

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

By the Court:

Robert C. Tucker,
Clerk.

APPENDIX C.

Fair Labor Standards Act of 1938, as Amended.

Section 3(b)—"Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(i)—"Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j)—"Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

6(a)—Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

7(a)—Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Appendix C.

Section 13(a) The provisions of sections 206 and 207 of this title shall not apply with respect to . . . or (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.